COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
CASE NO. 2015-SC-000144-D

MARY E. MCCANN, INDIVIDUALLY and ON BEHALF OF ALL OTHERS SIMILARLY SITUATED — APPELLANTS

V.

APPEAL FROM THE COURT OF APPEALS
CASE NO. 2014-CA-000392
JEFFERSON CIRCUIT COURT CASE NO. 10-CI-01130

THE SULLIVAN UNIVERSITY SYSTEM, INC. d/b/a SULLIVAN UNIVERSITY COLLEGE OF PHARMACY, et al. — APPELLEES

BRIEF OF *AMICUS CURIE* JEFFERSON COUNTY TEACHERS ASSOCIATION

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was mailed via U.S. Mail, postage prepaid, this 2nd day of February, 2016 to: Grover C. Potts, Jr., Michelle DeAnn Wyrick, Emily C. Lamb, Wyatt, Tarrant & Combs, Suite 2800, 500 West Jefferson Street, Louisville, KY 40202, Counsel for Appellees; Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Honorable Olu A. Stevens, Judge, Jefferson Circuit Court, Division Six, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, KY 40202, and Theodore W. Walton and Garry Adams, Clay Daniel Walton & Adams, PLC, Meidinger Tower, Suite, 462 S. Fourth Street, Louisville, KY 40202, Counsel for Appellants.

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STATEMENT OF POINTS AND AUTHORITIES

I. INTRODUCTION

In its Opinion rendered February 27, 2015 the Court of Appeals declared, as a matter of law, that the class action procedure under CR 23 is not available to employees who sue under KRS 337.385(2) to remedy employer violations of one or more of the provisions of KRS 337.020 to 337.285. It is the only decision to do so since the enactment of KRS 337.385 in 1974.

CR 23 is the procedure where, under proper circumstances, by various individual claims can be adjudicated in a single proceeding. As it relates to KRS 337.385, CR 23 is available as a procedure only if an employer's violation of the wage and hour laws affects enough employees that they are "so numerous the joinder of all [such employees] is impracticable." The more employees an employer denies the statutorily required wages or overtime compensation the more likely the CR 23 prerequisites would be met. Class actions are particularly apt against large employers, whose violations create a lot of victims at a single time, or persistent violators who, with the passage of time and employee turnover, likewise create a large number of victims. See, e.g. Hughes v. UPS Supply Chain Solutions, Inc., 2013 Ky. App. unpub. LEXIS 734 (Ky. Ct. App. Sept. 6, 2013) (limited class exceeded 11,000 UPS employees); Whitlock v. FSL Mgmt., LLC, 2012 U.S. Dist. LEXIS 112859 (W.D. Ky. Aug. 10, 2012) (the proposed class and sub-class consists of hundreds of past and present employees).

The typical small business, on the other hand, is unlikely to be faced with the prospect of class action over its violations of KRS 337.020 to 337.285. Quite simply, the vast majority of small business will not have the requisite number of employees to meet the numerosity requirement of CR 23. In 2012, over 54% of Kentucky's businesses had 4 or fewer employees with an average annual aggregate payroll of only $52,424.95. Over 83% of Kentucky's businesses had fewer than 20 employees with an average annual aggregate payroll of just $129,101.65. Only 3.2% of Kentucky's

businesses have over 500 employees. (Statistics of US Businesses; 2012 Economic Census, U.S. Census Bureau). Wage and hour claims will be, by their nature, for amounts representing only a small percentage of the total annual aggregate payroll.

In practical terms, the Court of Appeals' preclusion of CR 23 procedures from the enforcement of the wage and hour laws removes the most efficacious process for remedying the violations by a single employer with the most employee victims; the employers most likely to satisfy CR 23's numerosity requirement.

The probability that an employer will be required to pay every claim caused by its violations is significantly reduced if the only risk is from multiple small individual or joint claims. In contrast, class action procedures allow for the resolution of each and every violation of the law committed in a single proceeding.

Employers can count on the reality of that the small monetary claims, the time and expense of litigation, the fear of employees risking their jobs and livelihood by suing the boss, and the general inertia of people to avoid conflict, act as powerful deterrents to plaintiffs. Those larger employers not adverse to cutting corners, who skirt or just outright ignore the law, may be inclined to take the risk that the ensuing legal liability will be far less than the financial gain realized from the violations, if the risk of a class action is now removed. An employer may have to pay for a few claims, but it is unlikely it will ever have to pay for all.

When wage and hour laws are violated with impunity, the labor standards set thereby are undermined. Not only are the employees victimized by the denial of the statutorily required wages and overtime, but so are the employers who play by the rules and comply with the standards set by the Legislature. The labor standards set a level playing field for all employers. The Legislature did

not intend to give a competitive advantage to those employers, particularly to the largest employers, who fail to comply with the law.

Removing CR 23 as a procedure will have no impact on the smaller employers whose violations only affect a number of employees too small to meet the numerosity requirement of CR 23. But it will cause the largest employers to become the hardest to reach. CR 23 is a procedure designed for resolving only those claims too numerous to resolve in a single joint action and is a procedure which has been available and used without question for KRS 337.385 actions since its enactment over 40 years ago.

II. THE COURT OF APPEALS CONFLATES PROCEDURAL RULES AND SUBSTANTIVE LAW.

In holding that KRS 337.385 (2) "does not permit representative actions" (Opinion, pg. 12), the Court of Appeals pays scant heed to the distinction between the substantive right to bring an action and the procedures to be followed in adjudicating that action.

The central issue here is not the distinction in language between the Fair Labor Standards Act (FLSA) and KRS 337.385, or the resolution of a conflict between state statutes and the Federal Rules of Civil Procedure (FRCP) upon which the Court of Appeals devotes a significant portion of its Opinion. At issue is whether, under CR 1(2), KRS 337.385 is a special statutory proceeding, the procedural requirements of which are inconsistent with the procedures set forth in the Civil Rules. On this issue the Court of Appeals' analysis is brief and conclusory.

The Court of Appeals first notes that "[t]he language in KRS 337.385 specifying who has *standing* to pursue an action for unpaid wages, however, is not a mere procedural provision," citing Harris v. Reliable Reports, Inc., 2014 WL 931070 (N.D. Ind. 2014) for the proposition that "an opt-

in provision enacted as part of state wage and hour laws conferred substantive rights." (Opinion, pgs. 8-9). From this premise the Court of Appeals concluded "CR 23 cannot override KRS 337.385's limitation on who may bring claims for unpaid wages." (Opinion, pg. 9). Harris concerned a class procedure, identical to the FLSA, differing from the FRCP procedure. Harris held, citing Shady Grove Orthopedic Associates, P.A. v. Allstate insurance Company, 559 U.S. 393, 423 (2010) (Stevens, J. concurring), this alternate procedure was "so intertwined with the rights created by the [state] statutes" that the state procedure applied in federal district court instead of the inconsistent procedure under FRCP 23. KRS 337.385 did not enact any comparable procedure.

CR 23 is not a rule affecting standing. CR 23 does not expand the universe of those "*who* may bring claims for unpaid wages." Under KRS 337.385 standing is conferred on "any employee" who then can file suit individually or as a group; i.e. "one (1) or more employees." CR 23 is a rule of procedure for resolving *how* such claims, once brought, can be adjudicated if the requirements of the rule are met. To be included in the class, all class members, including the representative party bringing the action, must have standing under the statute, i.e. be an employee paid less than required by KRS 337.020 to 337.285.

KRS 337.385 identifies who has substantive rights. It does not provide any procedural rule, intertwined or not, inconsistent with CR 23.

III. KRS 337.385 IS NOT A SPECIAL STATUTORY PROCEEDING

Under the Constitution of Kentucky, Section 116, the power to prescribe and enforce court rules lies exclusively with this Court. Under Article 28 of the Constitution of Kentucky neither the Legislature nor the Executive can exercise the power granted to this Court by Section 116. CR 1(2) recognizes an exception for "special statutory proceedings." The Court of Appeals simply declares

"that relevant legislation [KRS 337.385 (2)] has otherwise created a special statutory proceeding in the instant case." (Opinion, pg. 6). This simple declaratory conclusion is the extent of the Court of Appeals' analysis. Precedent regarding what precisely constitutes a special statutory proceeding was not considered. A special statutory proceeding was defined in C.C. v. Cabinet for Health and Family Services, 330 S.W. 3d 83, 87 (Ky. 2011) as "one that is 'complete within itself having each procedural detail prescribed,'" quoting Swift & Co. v. Campbell, 360 S.W. 2d 213, 214 (KY. 1962).

KRS 337.385 does not provide any procedures for adjudicating an action to recover unpaid wages or liquidated damages after it has been filed. It delineates the remedies and limits thereto. It does not provide any procedural details, such as the opt-in provisions under the FLSA or at issue in Harris, *supra*, on how joint claims are to be adjudicated. Without any such procedural details "complete within itself," KRS 337.385 is not a special statutory proceeding. Actions thereunder are therefore, governed by the Civil Rules without exception.

IV. THE ABSENCE OF LANGUAGE AUTHORIZING ACTIONS UNDER CR 23 IS NOT A PROHIBITION ON CLASS ACTIONS

In the absence of any similar alternate "class" procedure as is available under FLSA or at issue in Harris, *supra*, the Court of Appeals posits that for CR 23 to apply the statute must affirmatively say so. "The instant case requires this C ourt to directly address whether KRS 337.385 *authorizes* class actions." (Opinion, pg. 7). "When Kentucky's General Assembly enacted KRS 337.385, it did not include language *allowing* representative for collective actions." (Opinion, pg. 8). From the absence of language specifically permitting "actions to brought on behalf of employees who are similarly situated," the Court of Appeals interprets the phrase "for and in behalf of himself, herself, or themselves" to be, under CR 1 (2), the "procedural requirement of the statute inconsistent

with the procedures set forth in the Rules."

Under CR 1(2) the default position is opposite to that taken by the Court of Appeals. All of the Civil Rules apply unless the legislation explicitly makes an exception, either by words of prohibition or by prescribing inconsistent procedural details. See, e.g. Califano v. Yamasaki, 442 U.S. 682, 700 (1979) ("In the absence of a direct expression by Congress of its intent to depart from the usual course of trying 'all suits of a civil nature' under the Rules established for that purpose, class relief is appropriate in civil action....") KRS 337.385 does neither. It states who may bring an action, "one (1) or more employees," but details no procedures on how claims involving more than one employee are to be adjudicated. For resolving such claims which are so numerous that their joinder would be impracticable, CR 23 is not only the most efficacious procedure; it is the *only* such procedure.

The absence of specific language authorizing class actions under CR 23, a rule otherwise applicable to "all actions of a civil nature," is a thin read upon which to read a prohibition on class actions into language which undisputably contemplates joint actions. Shawnee Telecom Resources, Inc. v. Brown, 354 S.W. 3d 542, 560 (Ky. 2011).

Nothing in KRS 337.385 indicates a legislative intent to remove a procedure that is only applicable when other forms of joint action are impracticable.

V. STATUTE TO BE INTERPRETED IN LIGHT OF ITS PURPOSE

Statutes are to be liberally construed with a view to promote their object and carry out the intent of the Legislature. KRS Section 446.020 (1). "[S]tatutes which are remedial in nature should be liberally construed in favor of their remedial purpose." Workforce Development Cabinet v. Gaines, 276 S.W. 3d 789, 792 (Ky. 2008) citing Kentucky Insurance Guarantee Association v.

Jeffers ex rel. Jeffers, 13 S.W. 3d 606, 611 (Ky. 2000).

KRS 337.385, and the entirety of KRS Chapter 337, regulates employers to the benefit of employees. Each of the provisions imposes an obligation or proscription on employers which consequently enures to the benefit of, or provides protection to, employees. KRS Chapter 337 is no less remedial than the Whistleblower Act at issue in Gaines.

The Court of Appeals dismisses consideration of the remedial purpose of the statute upon the basis that there is "no support in case law or legislative history, that Kentucky's Wage and Hour Act was intended to protect plaintiffs from predatory employers...." (Opinion, pg. 12). Whether "predatory" is the appropriate adjective to describe an employer who violates the law is simply a question of semantics. Substantively, however, eliminating the availability of the class action procedure runs counter to the remedial purpose of KRS Chapter 337. The Court of Appeals's strict construction of the "on behalf of" language means the Legislature intended to remove the only efficacious procedure for remedying multiple violations of the law so numerous that the joinder of all affected employees in a single action is impracticable. Such an interpretation, counter to the self-evident purpose of KRS Chapter 337, is without support in case or legislative history.

The Court of Appeals also gives short shrift to the value of the class action mechanism in overcoming "the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." Beattie v. CenturyTel, Inc., 511 F. 3d 554, 567 (6th Cir. 2007) quoting Am Chem Products v. Windsor, 521 U.S. 591, 617 (1997).[1]

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[1] The Court of Appeals illogically distinguishes Beattie on the sole basis that "Beattie is not a wage and hour case." (Opinion pg. 12, n. 3). The value of the class action mechanism to the problem of small recoveries is the same whether claims arise under a wage and hour law or any other remedial statute of whatever stripe.

Ignoring altogether the value of class actions to the remedial purposes of KRS Chapter 337, the Court of Appeals's response to the problem of small recoveries is to refer to the "effective and inexpensive administrative remedies to resolve claims from unpaid wages." (Opinion, pg. 12). KRS 337.385(2) allows the employee to choose a civil action irrespective of the administrative remedies available. Nothing in KRS 337.385(2) supports the notion that the Legislature intended to remove the choice of civil action from employees who happen to work for an employer with so many affected employees that joinder is impracticable. This Court recognized the judicial remedies of KRS 337.385(2) as "an incentive for employees to hire their own attorneys and pursue their own claims, thereby relieving the Commissioner of much of the burden of litigation." Parts Depot, Inc. v. Beiswenger, 170 S.W. 3d 354, 359 (Ky. 2005). Relegating the largest groups of employees to administrative remedies, and denying them benefits only available in a civil action, is contrary to the purpose of the statute. The availability of purportedly "effective and inexpensive administrative remedies" has no relevance to the issue of the Legislature's intent regarding class actions in wage and hour suits.

The Court of Appeals's belief that "[c]lass actions are *not necessary* to achieve any legislative goal under Kentucky's wage and hour statutes," (Opinion, pg. 12) is also not a relevant consideration in interpreting the Legislature's intent regarding CR 23 when it enacted KRS 337.385 in 1974 with the language "for and behalf of himself, herself and themselves." This language, identifying who has standing to bring a civil action, is insufficient to create a special statutory proceeding in which the procedural requirements of the statute are inconsistent with CR 23 or any other Civil Rule. The Court of Appeals engages in impermissible judicial legislating when it infers that class actions *must* be necessary to be permissible under KRS 337.385. In one sense class

actions are indeed necessary; when the number of employees of a single employer, who have been denied the benefits and protections of KRS 337.020 to 337.285, are so numerous that joinder is impracticable.

CONCLUSION

The reasoning employed by the Court of Appeals to interpret KRS 337.385 as precluding class actions for civil actions thereunder appears to be prompted, in part, by concern for the burden placed on employers defending against class actions. The Court of Appeals summarily dismissed consideration of the remedial purpose of KRS Chapter 337 and the value of class actions in effectuating that purpose. Yet, the evident purpose of KRS Chapter 337 is to protect employees and establish uniform employment standards.

This purpose is undermined by an interpretation which increases the difficulty to remedy violations by employers with the greatest number of adversely effected employees. Not only will more violations go unremedied to the financial detriment of the effected employees, such an interpretation will be to the detriment of those employers who follow the law. The competitive playing field will be tilted towards those to get away with it, and thereby compromise the uniformity of the employment standards.

Not only is such an interpretation at odds with the evident purpose of KRS Chapter 337, it is derived from what the Legislature did not say. KRS 337.385 is silent regarding CR 23. It does not directly state that CR 23 applies, nor does it directly state that CR 23 does not apply. The unstated intent is divined by the Court of Appeals from language which does nothing more than state the standing requirement for plaintiffs.

In the absence of an express directive, the legislative intent must be construed to effectuate

the purposes of the statute.

> "This is so, for a legislative intent not clearly revealed may be presumed to hold in contemplation the reasonable and probable. If something else was in view, it should not have been left to implication." George v. Scent, 346 S.W. 2d 784, 790 (Ky. 1961)

Nothing in KRS 337.385, legislative history or existing precedent indicates a legislative intent that KRS 337.385 intended any exception to the civil rules applicable to a cause of action thereunder. It is not reasonable or probable the Legislature contemplated increasing the difficulty of bringing the largest employers into compliance with the labor standards set by KRS Chapter 337.

For the foregoing reasons it is respectively submitted that the Court of Appeals' Opinion be reversed and that this matter be remanded to the Circuit Court for further proceedings.

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